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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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The Honorable Michael Powell
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: ET Docket 98-153/ In the Matter of Revision of Part 15 of the Commission's Rules Regarding Ultra-Wideband Transmission Systems

Dear Chairman Powell:

We are writing to express our deep concern regarding the position apparently being taken by Commission staff in the Ultra-wideband (UWB) proceeding. Only recently has Sirius learned informally that Commission staff are apparently proceeding on the understanding that Section 7 of the Communications Act of 1934 (47 U.S.C. §157) places the burden on Sirius and other operators of authorized services to show that unlicensed use of UWB devices will cause interference to existing services. Sirius strongly believes that this position (if, in fact, it exists) is based on a fundamental misunderstanding of Section 7, is contrary to legal precedent, and is directly contrary to the Commission's practice and rules in general, and Part 15 in particular.

The Commission is currently considering the authorization of a broad range of UWB devices under Part 15 of the Commission's rules. Under Part 15, the burden clearly falls on the proponent or manufacturer of a new device to establish that the new device, when operating under applicable technical specifications, will not cause harmful interference to existing authorized services.

Sirius has long been concerned that in the UWB proceeding, the Commission has in effect shifted the burden to incumbent operators to show that UWB devices *will* cause harmful interference to their authorized services. To date every test of UWB devices indicates that the devices tested will cause harmful interference to existing services. Nevertheless, the Commission is apparently moving rapidly towards authorizing UWB devices under Part 15. The Commission appears to support, albeit silently, UWB proponents' repeated claim that these test

results are inconclusive because existing authorized operators have not conclusively proved that UWB devices will always cause harmful interference.

Due to the wide range of existing UWB devices (whose operating characteristics vary enormously), the wide range of potential UWB devices (which do not exist to be tested), UWB devices' variable effect on existing services (most of which have not yet been tested against UWB devices), incumbent operators are placed in an impossible position. Sirius and other authorized operators can never prove that all (including non-existent) UWB devices will always interfere with all existing services. This situation is exacerbated by the fact that the Commission has not issued proposed technical rules for comment or review in an NPRM or Further NPRM in this proceeding. Operators of authorized systems cannot even begin to prove that UWB devices will cause harmful interference as deployed since the operating parameters and limits, even in proposed form, are not available for review and analysis. Both because of the practical impossibility of such a position and because of the clear burden placed on UWB proponents under Part 15, Sirius has repeatedly emphasized the UWB proponents must bear the burden of showing their devices will *not* cause harmful interference, a burden which they have so far singularly failed to meet.

Section 7 does not affect the burden of UWB proponents in this proceeding. Section 7 is a "broad statement of policy"[1] encouraging "the provision of new technologies and services to the public."[2] Commission staff are apparently relying on Section 7's statement that a person who opposes introduction of a new service or technology "shall have the burden of demonstrating that such proposal is inconsistent with the public interest."[3] Commission staff seem to interpret this language as shifting the burden of proving that a proposed Part 15 device will not cause harmful interference; in other words, to mean that a proposed Part 15 device will be permitted to operate *unless* the operator of an existing, authorized service can prove that the device will cause harmful interference to that service.. However, under Part 15 the burden is clearly on the proponent of a proposed unlicensed device to show that the device *will not* cause harmful interference to existing authorized services.[4] There is nothing to support the proposition that the very general language of Section 7 was ever intended to override the specific language of Part 15.

Part 15 devices are allowed only on the conditions that they cause no harmful interference to authorized services, and that the devices operate within the applicable power and

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1 *Alenco Communications, Inc. v. FCC*, 201 F. 3d 608, 615 n. 3 (5th Cir. 2000).

2 47 U.S.C. 157 (a).

3 *Id.*

4 If the Commission is in fact relying on Section 7 in this manner, that position is particularly perplexing because, far as we are aware, no entity in this proceeding, and certainly not Sirius, has ever opposed introduction of UWB devices or taken the position that development of UWB technology and UWB-based services is inconsistent with the public interest.

operating spectrum limits.[5] The burden is on proponents of these devices to certify or demonstrate compliance,[6] and devices causing interference must cease operation immediately.[7]

The Commission is now in the process of determining what operating requirements and limits UWB devices must comply with if they are to be introduced. Studies continue to show that UWB devices will interfere with authorized services such as PCS, GPS, and SDARS unless, possibly, their operating frequencies are significantly limited and power levels and other parameters are carefully controlled. Since if UWB devices are permitted under Part 15 it will be UWB manufacturers' burden to avoid interference, it is clearly their burden to show that operation is *possible* without interference.

Section 7 does not provide any conflicting or superceding procedure or requirements, and certainly says nothing about changing any procedures or burdens in applicable specific statutory provisions, rules, or practices. Rather, Section 7 provides broad policy guidance favoring the introduction of new services and technologies; when determining how best to meet this obligation, the Commission follows its specific statutory obligations and established procedures. *See, e.g., Alenco Communications Inc.,* 201 F. 3d at 615 n. 3 (stating that Section 7 is "merely a broad statement of policy" granting the Commission discretion as to how it should be fulfilled, and that a decision "that satisfies the [applicable] specific statutory requirements . . . necessarily satisfies the broad policy statement of §157(a).")

Furthermore, the Commission's practice makes clear that the public interest determination under Section 7 is a general, initial step, followed by detailed consideration of how to meet that obligation. *See, e.g., In The Matter Of Advanced Television Systems And Their Impact Upon The Existing Television Broadcast Service*, FCC 95-315 at ¶5 (released August 9, 1995) (stating that Section 7 and the general statutory obligation to promote the public interest support reconsideration of earlier decisions regarding broadcast television in light of new services and technology, and then proceeding to consider in detail how best to revise applicable rules to further the public interest.)

Sirius is not aware of any proceedings in which the Commission's invocation of Section 7 has caused any burden applicable to proponents of new services to be shifted to another party. To the contrary, Section 7 is cited in proceedings where proponents of new services are expressly required to show that their new services will not cause interference to existing authorized services. In the 2 GHz MSS proceeding, for example, the Commission noted in the NPRM that one of its goals in determining service rules was to promote the Section 7

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5 *See* 47 CFR §§ 15.1, 15.5, 15.6.

6 *See* 47 CFR §§15.29, 15.37; *see generally* 47 CFR Part 2, Subpart J.

7 *See* 47 CFR §15.5.

policy favoring new and diverse technologies.[8] However, the Commission concluded that Section 25.279 of the Commission's rules would apply to all proponents of 2 GHz MSS systems.[9] Section 25.279 requires that system proponents "show that they will not cause interference to authorized federal government users," and further requires proponents of the new service to coordinate with existing permittees and licensees.[10] Significantly, existing authorized operators are not required to suggest changes or reengineer an applicant's proposal in the case of conflicts: if such action is necessary, this burden falls on the proponent of the new service.[11] Beyond application of 25.279, nothing in the 2 GHz proceeding even hinted that any burden would be shifted from proponents of new systems concerning demonstrating compliance with system operating parameters, implementation milestones, or any of the other licensing requirements implemented in that proceeding.

Until very recently, there had been no indication that Commission staff were proceeding any differently here. Indeed, in the NPRM, the Commission stated that "[w]e note that Section 7 of the Communications Act of 1934. . . requires the Commission 'to encourage the provision of new technologies and services to the public.' Accordingly, we conclude that the Commission should develop reasonable regulations that will foster the development of UWB technology while continuing to protect radio services against interference."[12]

Having made the public interest and general Section 7 policy determination, the issue before the Commission now is how to allow UWB technology to develop without harming authorized services. Since the Commission is at present considering such deployment under Part 15, the issue is whether UWB devices can operate as unlicensed Part 15 devices without causing harmful interference to licensed services, and if so, under what requirements.[13] As in the 2 GHz MSS proceeding, the Section 7 policy goal was met when the Commission determined to consider deployment of UWB devices. The issue of whether or how UWB proponents can meet their obligations under Part 15 (or otherwise operate without causing interference) is not altered

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8 *See Notice of Proposed Rulemaking, In The Matter Of Establishment Of Policies And Service Rules For The Mobile Satellite Service In The 2 GHz Band*, IB Docket No. 99-81, 64 FR 16880, at ¶16 (released March 25, 1999).

9 *See Report and Order, In The Matter Of Establishment Of Policies And Service Rules For The Mobile Satellite Service In The 2 GHz Band*, IB Docket No. 99-81, FCC 00-302, at ¶88 (released August 25, 2000).

10 47 CFR §25.279(b)(1)(ii); *see* 47 CFR §25.279 (b)(2).

11 *See Id.*

12 *Notice of Proposed Rulemaking, In the Matter of Revision of Part 15 of the Commission's Rules Regarding Ultra-Wideband Transmission Systems*, ET Docket 98-153 at ¶ 8 (released May 11, 2000) (citation omitted).

13 Sirius continues to believe that Part 15 is not the appropriate regulatory regime for UWB devices, and that a licensing approach specifically tailored to the different categories of UWB devices should be developed.

by this past policy determination. The burden of demonstrating non-interfering operation under Part 15 is clearly with UWB proponents.

Sincerely yours,
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